for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

DEFENSE VICTORIES, 1994 (?)

By James P. Cleary

Arizona appellate decisions from 1994 resulted in decisions in several areas which could be claimed as defense victories in the criminal arena. The following outline categorizes those decisions into five areas: substantive law decisions; procedural decisions; procedural decisions -- guilty pleas; trial evidentiary decisions; and sentencing decisions.

I. SUBSTANTIVE LAW DECISIONS

A. *State v. Alvarado*, 875 P.2d 198 (CA-1 1994). The Arizona Court of Appeals held that in a prosecution for offering to sell marijuana, a speaker's intentions in offering to sell marijuana are relevant. The court found that mere words are not sufficient to establish liability as it is not a strict liability crime.

II. PROCEDURAL DECISIONS

A. *State v. Evans*, 866 P.2d 869 (1994). The Arizona Supreme Court upheld a trial court's decision to suppress the arrest of an individual who was apprehended due to an erroneous warrant left outstanding due to justice court clerical error. The court reasoned that the exclusionary rule would be the appropriate remedy to deter clerical errors and to abate the growth of "Orwellian mischief."

B. *State v. Robinson*, 869 P.2d 1196 (1994). The Arizona Supreme Court held that under Rule 27.7 (c)(2), Rules of Criminal Procedure, a defendant cannot be found to have violated a term of his probation unless he has received written notice of the term allegedly violated. While the court recognized that oral orders are necessary for communications between probationers and their probation officers, it found that if an order is important enough to be obeyed and warrant revocation proceedings, it must be in writing.

(cont. on pg. 2)☞

C. *State v. Millanes*, 166 A.A.R. 43 (CA-1 1994). The Arizona Court of Appeals held that a defendant does not waive a double jeopardy claim by merely failing to raise it in the trial court. Further, the court held that once a trial court, on the record, has granted an acquittal on the basis of insufficient evidence, it cannot thereafter reconsider and reinstate the charge.

D. *State v. Pinto*, 880 P.2d 1139 (CA-1 1994). The Arizona Court of Appeals concluded that in entertaining or considering designation of a Class 6 offense as a felony, a defendant is entitled to a hearing as a matter of right if he or she requests one. The court reasoned that because designation rests within the discretion of the trial court, due process requires that a defendant be given notice and an opportunity to be heard prior to a trial court's designation of an offense as a felony.

E. *Ridenour v. Schwartz*, 875 P.2d 1306 (1994). The Arizona Supreme Court found that a Maricopa County Superior Court Administrative Order restricting public access to the court building after 3:00 p.m. on court days did not infringe upon a defendant's right to a public trial. However, it did hold that such an order did interfere with the public's right of access to trials and court proceedings. This was deemed to be a violation of Article 2, Section 11 of the Arizona Constitution requiring that "justice in all cases shall be administered openly."

F. *State v. Eccles*, 877 P.2d 799 (1994). The Arizona Supreme Court found that a condition of probation imposed upon a probationer sentenced to a sexual offender treatment program, requiring the defendant to waive his right against self-incrimination under penalty of having his probation revoked, was unconstitutional. The court reasoned that to do otherwise would be to infringe upon the probationer's right not to incriminate himself. The court suggested that where answers are necessary for the effective administration of probation the probation officer and the state may grant immunity for any answers.

G. *Chavez v. Superior Court*, 174 A.A.R. 34 (CA-1 1994). The Arizona Court of Appeals held that Rule 17.4(g), Rules of Criminal Procedure, requires disqualification of a judge even when the defendant withdraws from a guilty plea prior to acceptance. The court reasoned that whether the defendant withdraws from a plea prior to acceptance or when he or she withdraws from the plea following its rejection, prejudice may arise due to the trial judge's examination of information in a presentence report. The court assumes that in such a situation a presentence report has been submitted.

H. *State v. Munoz*, 174 A.A.R. 36 (CA-2 1994). The Arizona Court of Appeals found that a Tucson Police Department technique of seizing by use of fingerprint-tape white powder around the noses of primarily Hispanic traffic violators, in an area of Tucson which was overwhelmingly hispanic, was a discriminatory law enforcement technique in violation of the equal protection clause. While no Tucson Police Department document said the technique was only to be employed in primarily Hispanic sections of the city,

(cont. on pg. 3)☞

for The Defense

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the trial court's finding that this technique was used for a year only in an Hispanic section of the city demonstrated improper motivation.

I. *State v. Hershberger*, 178 A.A.R. 3 (CA-1 1994). The Arizona Court of Appeals remanded for an evidentiary hearing on a claim that a defendant's guilty plea to indecent exposure was the product of coercion and misadvice by his defense counsel. Of primary concern to the court were the petitioner's claims that he had lied to the court about his guilt due to the defense attorney's coaching and misadvice concerning his requirements to register as a sex offender.

III. PROCEDURAL DECISIONS -- GUILTY PLEAS

A. *State v. Salinas*, 880 P.2d 708 (CA-1 1994). The Arizona Court of Appeals found that the following statement by a defendant in a change of plea hearing for a possession of less than one pound of marijuana for sale was an insufficient factual basis for the plea, requiring vacation of the plea: "The marijuana wasn't for sale, but ... and that residential trespass ... it's all true."

B. *Washington v. Superior Court*, 881 P.2d 1196 (CA-1 1994). The Arizona Court of Appeals held that a no contest plea is subject to the same withdrawal standards as an *Alford* plea, and that the defendant should have been permitted to withdraw his plea when a previously unknown witness came forward with exculpatory evidence after the plea but before the date of sentencing.

IV. TRIAL EVIDENTIARY DECISIONS

A. *State v. Fodor*, 880 P.2d 662 (CA-1 1994). The Arizona Court of Appeals found that a wiretapped conversation between a defendant and an attorney, under the circumstances, was a privileged communication protected by the attorney-client privilege and therefore not admissible in a perjury prosecution against the defendant. The court also found that the court should have granted an acquittal as to one of the two counts as, essentially, the two counts for perjury involved answers to slightly different forms of the same question.

B. *State v. Portillo*, 876 P.2d 1151 (CA-1 1994). Defendant's convictions for money laundering and conspiracy to sell marijuana were reversed. The money laundering conviction was reversed due to the trial court's instruction relating to vicarious culpability, which was an incorrect statement of the law, and also because the court failed to give a mere presence instruction. It also reversed the conviction for conspiracy to sell marijuana because the instruction defining conspiracy was prejudicially incomplete.

C. *State v. Magana*, 874 P.2d 973 (CA-1 1994). The Arizona Court of Appeals reversed the convictions and sentence of the defendant for a count of negligent homicide. Under the facts of the case the court determined that the trial court erred in refusing to give defendant's requested instruction on the lesser included offense of reckless driving.

D. *State v. Keeley*, 871 P.2d 1169 (CA-1 1994). The Arizona Court of Appeals reversed convictions of a defendant for possession of marijuana and possession of drug paraphernalia. The court found that a request for a mistrial in the trial court should have been granted after the deputy county attorney elicited testimony from the arresting officer that the defendant invoked his right to remain silent when asked a post-arrest question he did not want to answer. The court concluded that the state deliberately created the constitutional error.

E. *State v. Lara*, 880 P.2d 1124 (CA-2 1994). The Arizona Court of Appeals reversed a conviction for aggravated assault when it found that the trial court improperly refused defendant's requested instruction that the state had to prove his act of attacking the victim was a voluntary act. The court found that under the evidence presented the

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requested instruction was consistent with the defense theory proposed at trial and thus was appropriate for submission to the jury. Also, the court found that the trial court erred by failing to give the defendant's requested instruction on the lesser included offense of disorderly conduct by reckless display of a deadly weapon.

F. *State v. Ott*, 162 A.A.R. 66 (CA-1 1994). In a prosecution for conspiracy to sell narcotic drugs, sale of narcotic drugs, possession of narcotic drugs and possession of drug paraphernalia, the Arizona Court of Appeals found that the trial court abused its discretion in allowing four witnesses to testify against the defendant as to more than 20 instances of prior uncharged crimes. The court found, in reviewing the Arizona Rules of Evidence, Rule 105, Rule 402, Rule 403, and Rule 404, that the court did not properly evaluate the prior bad act evidence in ruling on its admissibility.

G. *State v. Detrich*, 873 P.2d 1302 (1994). The Arizona Supreme Court in this capital case reversed the defendant's convictions for first degree murder and kidnapping due to the trial court's failure to give a lesser included offense instruction on unlawful imprisonment. The court reasoned that as the prosecution was based upon a felony-murder theory, it was error for the trial court to fail to give the unlawful imprisonment instruction as the evidence was unclear as to whether the verdict was for a finding of kidnapping or sexual abuse as the predicate felony for the felony-murder conviction.

H. *State v. Clark*, 164 A.A.R. 68 (CA-1 1994). The Arizona Court of Appeals reversed five, class 2 convictions against the defendant for attempted first degree murder, kidnapping, first degree burglary and two counts of sexual assault. The court found that the DNA testimony and testimony concerning random match probability calculations, and its admission at the trial, constituted error resulting in contamination of the verdicts, in light of the defendant's defenses.

I. *State v. Miller*, 875 P.2d 788 (1994). The Arizona Supreme Court reversed convictions of the defendant for endangerment and unlawful flight due to juror misconduct. The court found that the trial court's failure to conduct a hearing and inquire into alleged juror misconduct was error. The circumstances arose around an alternate juror's actions of leaving on a remaining juror's car a note which said either "he's guilty" or "my vote is guilty." The trial court, upon remand, was to evaluate whether or not the misconduct warranted a new trial if there was actual prejudice or prejudice may be fairly presumed from the facts.

J. *State v. Medina*, 875 P.2d 803 (1994). The Arizona Supreme Court reversed first degree murder conviction of the defendant due to admission of preliminary hearing testimony at defendant's trial. The court concluded that the prosecution had not proved unavailability of the witness whose testimony was read. It further found that the testimony was not harmless error.

K. *State v. Luzanilla*, 880 P.2d 611 (1994). The Arizona Supreme Court did find, once again, that there was error due to admission of prerecorded testimony of a witness against the defendant. However, it found the error harmless.

L. *State v. Hummert*, 170 A.A.R. 17 (CA-1 1994). The Arizona Court of Appeals held in this appeal from convictions for two counts of sexual assault and other related offenses that the admission of expert testimony that a declared "match" of DNA samples uniquely identified the defendant as the assailant was error. The court found that in the absence of generally accepted population frequency statistics for calculating the probability of a random match of DNA samples, such testimony would be error. The court found also that the error was not harmless.

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M. *State v. Johnson*, 880 P.2d 132 (1994). In reviewing the facts in a prosecution for fraudulent schemes and artifices, the Arizona Supreme Court found that the evidence did not support any false or fraudulent pretenses, representations or promises. Under the facts of this prosecution the court concluded that, at best, all that was shown was theft.

N. *State v. Agee*, 170 A.A.R. 62 (CA-1 1994). The Arizona Court of Appeals reversed a conviction for aggravated DUI on the trial court's failure to give a requested defense instruction requiring the jury to find beyond a reasonable doubt that the defendant knew or should have known that his license was suspended.

O. *State v. Johnson (Buccola)*, 172 A.A.R. 58 (CA-1 1994). The Arizona Court of Appeals upheld a trial court's finding that A.R.S. § 28-110 (F) does not relieve the MVD custodian whose name appears on the document certifying to MVD records of having personal knowledge of the document's creation or existence.

P. *State v. Salazar*, 173 A.A.R. 3 (CA-1 1994). The Arizona Court of Appeals reversed a conviction of attempted child molestation. The court found that the introduction of detailed and inflammatory evidence of prior sexual crimes denied defendant a fair trial. In review under Rules 404 and 403 of the Rules of Evidence, the court found the trial court abused its discretion in admitting prior bad acts.

Q. *State v. Lautzenheiser*, 881 P.2d 339 (1994). The Arizona Supreme Court reversed a conviction for aggravated DUI. The court found that under the facts of the case, the defendant did not receive a fair trial at the hands of an independent jury whose members were free from intimidation or undue pressure. Here the court found that sending a jury back on New Year's Eve after one juror declared that its verdict was not that stated in court was coercive and denied defendant a fair trial.

R. *State v. Gates*, 174 A.A.R. 30 (CA-1 1994). The Arizona Court of Appeals reversed convictions for sexual exploitation of a minor. The court found that video tapes which allegedly depicted minors engaged in sexual conduct were not such as alleged.

S. *State v. Valdez*, 181 A.A.R. 7 (CA-1 1994). The Arizona Court of Appeals concluded that A.R.S. § 13-5553 (A)(2) does not permit multiple convictions for possessing one roll of undeveloped film that is capable of being used to produce more than one photographic image.

T. *State v. Lopez*, 180 A.A.R. 25 (1994). Here the Arizona Supreme Court reaffirms its prior holdings relative to admission of hypnotically induced testimony. The court found that the court of appeals erred by holding that no forensic hypnosis guidelines need be followed to admit testimony relating to matters demonstrably recalled before hypnosis. Essentially, the court found that since there were no safeguards in the hypnotic sessions that produce testimony, it was impermissible to use any post-hypnotic testimony.

V. SENTENCING DECISIONS

A. *State v. Richmond*, 179 A.A.R. 57 (1994). The Arizona Supreme Court in this capital case, after a significant 20-year litigation history, reduced the defendant's death sentence to life imprisonment.

B. *State v. Carbajal*, 868 P.2d 1044 (CA-1 1994). The Arizona Court of Appeals set aside an order of restitution in the sum of nearly $25,000.00. The court found that the restitution order was made to compensate the victims for their emotional and mental health, their sorrow and their neglect. The court found these to be other than economic losses, and thus not compensable under the restitution statutes.

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C. *State v. Gallegos*, 160 A.A.R. 43 (1994). In this capital case the Arizona Supreme Court remanded for resentencing for reconsideration of the defendant's impairment under A.R.S. 13-703(g)(1) as a mitigating factor. The court found that the trial court did not sufficiently consider this in weighing aggravating versus mitigating factors.

D. *State v. Poundstone*, 164 A.A.R. 49 (CA-1 1994). The Arizona Court of Appeals held in this case that where a defendant is sentenced on multiple convictions arising out of the same factual situation, then a felony assessment may only be imposed once. To impose it more than once would be multiple punishment for the same act or omission.

E. *State v. Cornell*, 878 P.2d 1352 (1994). The Arizona Supreme Court reduced a death sentence to life imprisonment when it was determined that an aggravating circumstance no longer existed. Essentially, a prior conviction upon which an aggravating circumstance was found had been reversed and therefore could not be used.

F. *State v. Ellevan*, 880 P.2d 139 (CA-1 1994). The Arizona Court of Appeals held that in a sentencing decision by a trial court, if a defendant meets by a preponderant evidence that he was infected with the aids virus, that would then be a mitigating factor in determining the appropriate term of imprisonment or sentence.

G. *State v. Eastlack*, 177 A.A.R. 33 (1994). The Arizona Supreme Court set aside a death sentence and remanded for resentencing to the trial court due to the trial court's failure to appoint and authorize appointment of expert assistance for defendant to obtain mitigating circumstances or evidence.

H. *State v. Tarango*, 178 A.A.R. 27 (CA-1 1994). The Arizona Court of Appeals clarified the defendant's eligibility for release after serving two-thirds of prison sentences upon convictions of sale of narcotic drugs and two counts of possession of narcotic drugs for sale, with two prior felony convictions. The court resolves a conflict between former A.R.S. § 13-3408(B) and A.R.S. 13-604(D) and (K). Ω

Surveys and Studies

According to a new U.S. Department of Justice report:

- almost 900,000 felons were convicted in state courts in 1992--a 34% increase from 1988 when the first comparable study was made.
- "guilty" pleas still account for more than nine out of ten convictions.

The Death Penalty Information Center recently reported the following survey results:

Primary Focus for Police Chiefs in Reducing Violent Crime

	PERCENT NAMING ITEM AS PRIMARY FOCUS
Reducing drug abuse	31%
Better economy, more jobs	17%
Simplifying court rules	16%
Longer prison sentences	15%
More police on the street	10%
Reducing the number of guns	3%
Expanded use of death penalty	1%

Ω

RoUnD uP ThE UsuAL SuSPEcTS

The Immigrant Client & Reentry for Court Proceedings

Silence is one of the hardest arguments to refute, and unfortunately that's what sometimes happens with our illegal immigrant clients. The murky waters of immigration issues often leave criminal law practitioners stammering, telling the client that they don't know the answer.

As a recent seminar on immigration consequences for clients stressed, the most important issue to resolve with a client who may be facing deportation is to determine what his/her present status is. All non-U.S. citizens are subject to deportation or exclusion if they are convicted of or admit to certain criminal conduct.

But there are other issues that you may not have thought of that you may advise a client about (since it pertains directly to representation). For example, what about the client who returns to Mexico, but wants to come back for a trial, hearing, or other legal matter involving his case? What if an essential witness, who is in Mexico, wants to come to testify, but doesn't have a visa? Maybe the client's relatives are needed to testify at a mitigation or restitution hearing. Those may be just some of the valid reasons an **advance parole** might be obtained.

Advance Parole

There is a way to obtain legal admittance to the U.S. for court proceedings. It's called an advance parole. Basically, if a client is outside the U.S. and must travel back into the country for emergency business or some personal reasons, she may apply for an advance parole document to be "paroled" into the U.S., if the person can't obtain a visa or excludability waiver.

Of course, there are certain conditions pertaining to an advance parole document. Asking your client the right questions and seeking advice from an immigration lawyer, however, may pay off for the client.

Public defenders in Cochise County routinely use advance parole for their clients who are in Mexico and who need to return for court (I'm indebted to Diana Squires and Aileen Bovee of the Cochise County Legal Defender Office for their help on this practice tip).

If you want to look into this for a client, the basic procedure requires obtaining a INS Form 1-131. Once it's properly filled out, the prosecutor's signature must be obtained indicating she has no objection to the Advance Parole. Once the concurrence is signed, the original form and concurrence must be sent to Laura Maxwell, at the INS Phoenix Office (2035 North Central Avenue, Phoenix, Arizona 85004-1548). Ms. Maxwell's telephone number is (602) 379-6657 (FAX is [602] 379-4190).

Copies of the Form 1-131 must also be sent to the Port of Entry where the client will cross.

The Informer

The unjust knoweth no shame.
Zephaniah 3:5

A recent informant case I was involved in was pretty glitzy. The local police associated with the FBI to bust the client--complete with a hidden video in the side panel of the car. This was no Barney Fife investigation--unfortunately it left the client saying "Turn it off!" when it came video review time. It was him.

Coming back to the front can be painful--so I learned. In this case the FBI imposed fairly strict controls on the informant. Searched before and after. Regularly debriefed and supposedly tested for drugs.

But the so-called war on drugs is increasingly bringing informants under scrutiny. Several high-profile cases in other states have ended with innocent people being killed because of bad informant tips. A recent 9th Circuit case puts it in perspective:

> By definition, criminal informants are cut from untrustworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. *U.S. v. Bernal-Obeso*, F.2d 331 (9th Cir. 1993).

One fertile area for police interviews, that may be pursued whether or not the court orders the informant's identity revealed, is the informant's motivation. Does the "handler" understand the informant's motivation? Is it money? Working off a charge? What does the handler think the motivation is?

Probably, the next most important area of examination is whether the handler followed her agency's rules for informants. All large police forces have

(cont. on pg. 8)☞

few policies contained in a "confidential operations manual" used by the DEA. I'm paraphrasing some of the policies since they make an excellent starting point for interviews and cross-examination in informant cases. It might be particularly useful to compare and contrast the "elite" DEA's informant rules with local police departments in the appropriate case. Here are some tidbits:

* DEA requires that each informant's criminal history be checked in DEA and FBI files, as well as any other national crime data bases available.

* Two agents should always be able to contact the informant, and it is preferred that the informant is always contacted by two agents.

* Informants may not commit criminal law violations, and if discovered, it must be turned over to the appropriate law enforcement agency for prosecution.

* All informant contacts must be documented in writing.

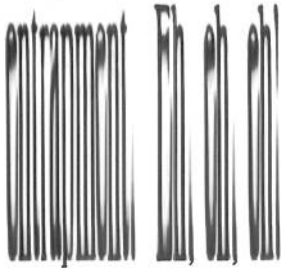
* Informants doing deals will be "thoroughly" searched before and after the undercover work and should be kept under continuous observation.

* Payment should be based on who the target is, potential size of seizure, and the "significance" of the informant's contribution to the operation.

* A full debriefing should be performed--which includes at least one every 90 days.

* All payments must be witnessed by another agent.

* When informants are paid on a commission basis, they should be instructed about the law of



* Payments should be completed before an informant testifies.

Additionally, here's a mini-trial notebook of informant cases:

* *Roviaro v. U.S.*, 353 U.S. 53 (1957) (revealing informant's identity requires accused's showing

U.S. v. Lewis, 671 F.2d 1023 (7th Cir. 1982) (informant's role in crime is factor in favor of disclosure--mere tipster unlikely to be disclosed).

* *U.S. v. Diaz*, 655 F.2d 580 (5th Cir. 1981) (just introducing police to accused is not enough to force revealing identity).

* *Illinois v. Gates*, 462 U.S. 213 (1983) (*Aguilar v. Texas* test abandoned for totality of circumstances in establishing whether informant-based search warrant is good).

California Dreamin': The OJ Trial Notebook

Thou scarest me with dreams, and terrifiest me through visions.

Job 7:14

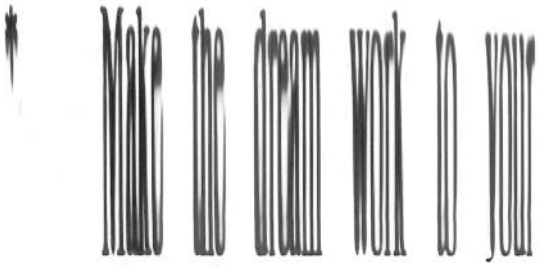
How do you cross-examine a dream? Former cop and O.J. Simpson hanger-on Ronald Shipp says O.J. told him he dreamed about killing his ex-wife. Judge Lance Ito let in the testimony. Reversible error? Since evidentiary decisions are usually left to the discretion of the trial court, is there any chance it will be overturned? Is it just prejudicial? You make the call.

If you're the defense, what do you do?

* Call an expert to rebut?

* Forget about it--it's too small an issue in a larger canvass?

* Don't ever let Paul Douglas cross-examine a witness again until he learns not to open the door for a witness to slap him around?



advantage?

How about the latter? Douglas is a weak link in the Dream Team. If it was coming in anyway, couldn't he have made this more painless? Douglas came across as a bully. Is that strange that O.J. may have dreamed about killing his wife after such a psychological trauma?

(cont. on pg. 9)☞

Could it be interpreted as guilt for not being there to protect a person he loved? There's got to be a way to make the dream work for the defense.

Christopher Darden or Darth Vader?

Prosecutor Christopher Darden publishes a giant-size picture of a battered Nicole Simpson to the jury. Only one problem--one that's pretty basic evidence--Darden couldn't authenticate the picture. There was absolutely no known time for when the picture was taken. Is this worse than the Johnnie Cochran "stealth" opening? What's a decent defense counsel to do? You make the call.

* Move for a mistrial?
* Make Prosecutor Darden repeat evidence 101?
* Punch his bar ticket?
* Wonder why California doesn't have an equivalent to the *Poole* prosecutorial misconduct case?

Shipp Shape

Former police officer Ron Shipp, in a dull moment, looks at O.J. in the courtroom and mouths the words, "Tell the truth." Prosecutor Darden then tries to bring it to the attention of the jury. You make the call.

* Object, ask for side bar and hope the jurors can't read lips?
* Make a speaking objection that points out Darden's sleazy conduct?
* Ask the witness why he doesn't tell the truth?
* On cross:
  Q: You were mouthing words to my client?

  A: Yes.

  Q: You're a former police officer?

  A: Yes.

  Q: You were trained to be a professional?

  A: Yes.

  Q: You've testified before?

  A: Yes.

  Q: You know what you did is improper?

  A: I just felt I had to say...

  Q: You know what you did was improper?

  A: Yes.

Ω

Res Ipsa Loquitur

(The Thing Speaks for Itself)

Did you hear about the starving attorney who stood on street corners with a sign "Will *plead* for food"?

~ ~ ~ ~ ~

"A right does not become a left unless you turn around." --Yogi Berra

"What's all this about civil tights?" --Emily Latella

"Rights? I got rights?" --Ernesto Miranda

Ω

Myths About Domestic Violence

by Bonnie Black, Maricopa County Probation Department

Myth	Fact
1. Domestic violence only affects minorities and low income groups.	Domestic violence **affects everyone** regardless of race, religion, or socio-economic group.
2. Alcohol causes domestic violence.	Alcohol can increase the frequency and severity of the abuse but **no causal relationship** exists.
3. Women deserve to be abused if they stay.	**No one deserves to be abused.** Victims suffer from low self-esteem, and their reasons for staying can be legitimate, including the fact that separation can be the most dangerous time for the victim.
4. Violence is a private matter and others shouldn't interfere.	**Domestic violence is a crime.** It is no longer acceptable just because it is behind "closed doors." Without intervention, the cycle of violence will continue from generation to generation.
5. Abuser is violent in all relationships.	**80% of men who batter are not violent in any other aspect of their lives.** They are mainly a threat to their families.
6. Domestic violence is anger based and anger-control counseling is viewed as a solution.	Domestic violence is **not** anger driven. It is power and control over another person.
7. The victim must assume some responsibility for provoking the violence.	Victim-blaming is a way to avoid responsibility. Violence is **never justified** regardless of the problem.
8. The abuser suffers from a mental illness.	Viewing domestic violence as an illness excuses the behavior. **Abuse is learned behavior.**
9. The abuser is not loving.	Abusers are **described as caring, giving, attentive, exciting, and affectionate.** These good times convince the victim to forgive the violence.
10. Battered women can always leave.	Often there is **no place to go** and they have **little support.**

Lonely end of a 'miner's canary'

by E.J. Montini

Bill Helme didn't try to avoid me back in 1987. I thought he might, the way politicians and bureaucrats do when they know I'm looking for them. Helme knew. He didn't hide.

He was a Maricopa County prosecutor in those days, and I'd been talking to a rape victim who was upset about the plea bargain Helme had approved for her attacker. The case was solid and the victim wanted to testify. Instead, she found out that Helme had allowed the man to plead guilty to a lesser crime. The deal still called for a 15-year prison sentence, but that wasn't enough for the victim. So she called me.

"I was raped, and I will not be satisfied until he is in jail for rape," she said.

Helme was stunned.

"I looked at the amount of time (the rapist) was getting along with the fact that she would be spared having to testify at the trial, and on those grounds, I was able to justify the sentence," he said.

When he found out how angry the victim was, Helme tried to withdraw from the deal. The judge wouldn't allow it. As we spoke, Helme anguished over what had happened. He thought he was helping the woman. The headline on the article I later wrote called him a "well-meaning prosecutor."

We never spoke again. I found out last week, however, that he carried a copy of the article around with him. I'd misspelled his name in it, but he didn't call to tell me.

Just too much

"Bill was never cut out to be a prosecutor," said Barbara Womack, who was Helme's girlfriend. "He knew that. It wasn't very long after you wrote about him that he left the prosecutor's office and became a defense attorney."

For a while, Helme worked in adult courts. It's a different side of the battle line, but the same war. Same casualties. Courtrooms are only sanitized field hospitals, places where lawyers and judges try to patch up the wounded and sanctify the dead.

This, too, proved too much for Helme.

"I work with handicapped kids," Womack told me, "and Bill often said, 'I don't know how you do that, it must be really tough.' But it was worse for him. He worked where we deposit our troubles and say, 'Here, you sort them out.'"

And he suffered for it. After a time in the adult courts, Helme began working with juveniles, where the stories are just as ugly and cruel, and the victims younger.

"He was the best person I knew," Womack said. "The kind of man who absorbed the world's troubles like a sponge and never wrung it out."

Couple 'clicked'

The couple met through a dating service.

"Neither one of us expected to find a person suited to us," Womack said. "We were like fish out of water. But when we met, it just clicked."

They remained together even as Helme suffered through bouts of depression. He always seemed to come out of them, Womack said.

In mid-December, however, Helme drove to Payson. He brought with him a loaded pistol and a Bible. The next day, hikers found his body in a lovely wooded area near a stream. The book was next to him, a twig marking the 23rd Psalm.

He maketh me to lie down in green pastures; he leadeth me beside the still waters. He restoreth my soul.

. . .

Barbara Womack wanted me to know this. Not just because Bill Helme was a good man and she loved him, but because he was *necessary*.

"They're out there," she said. "Good, kind people done in by all the evils of the world. Like Bill."

She thinks of him, she said, as a miner's canary.

I know what that is. My grandfather dug coal in West Virginia at a time when miners carried songbirds with them into the holes. The canaries represented beauty and salvation. One of the great dangers in a mine is the buildup of colorless, odorless, highly explosive methane gas. It's deadly to the birds. It was their warning. When the songs stopped, the miners scurried to fresh air.

Sometime in mid-December in a green pasture near the still waters of Payson, the songs stopped. In our noisy world, Barbara Womack worries that we do not hear the silence.

February Jury Trials

January 24

John Taradash: Client charged with eight counts of sexual misconduct involving a minor. Trial before Judge Hauser ended February 7. Defendant found guilty. Prosecutor J. Heilman.

January 30

Dan Carrion: Client charged with aggravated assault (dangerous and while on probation). Trial before Judge Bolton ended February 3. Defendant found guilty of aggravated assault (non-dangerous and prior untrue). Prosecutor J. Collins.

Donna Elm: Client charged with sale of narcotic drugs (with three priors). Investigator B. Abernethy. Trial before Judge Chornenky ended February 2. Defendant found guilty with three priors. Prosecutor G. McCormick.

February 1

Paul Lerner: Client charged with aggravated assault. Investigator G. Beatty. Trial before Judge Jarrett ended February 6 in a mistrial. Prosecutor M. Vincent.

February 2

Tim Agan: Client charged with four counts of armed burglary, four counts of armed robbery, four counts of kidnapping, aggravated assault, possession of dangerous drugs, and escape. Trial before Judge S. Gerst ended February 8. Defendant found guilty. Prosecutor B. Jorgenson.

Mimi Allen: Client charged with manslaughter (dangerous), aggravated assault (dangerous) and endangerment (dangerous). Investigator R. Barwick. Trial before Judge D'Angelo ended February 22. Defendant received **judgment of acquittal** on endangerment, guilty of lesser included negligent homicide, and guilty of aggravated assault. Prosecutor M. Rand.

Brian Bond & Mara Siegel: Client charged with two counts of armed robbery. Investigator P. Kasieta. Trial before Judge Jones ended February 14 with a hung jury. Prosecutor J. Sullivan.

Jeff Van Norman: Client charged with aggravated assault. Investigator T. Thomas. Trial before Judge Kaufman ended February 13. Defendant found **not guilty** on aggravated assault; guilty of disorderly conduct. Prosecutor G. McKay.

February 6

Dave Anderson: Client charged with aggravated assault with priors. Trial before Judge Portley ended February 7. Defendant found **not guilty** of priors, guilty of aggravated assault. Prosecutor C. Smyer.

February 7

Rob Corbitt: Client charged with two counts of aggravated DUI. Trial before Judge Portley ended February 10 with a hung jury on count I and guilty on count II. Prosecutor L. Peters.

Peggy Lemoine: Client charged with aggravated assault. Investigator J. Castro. Trial before Judge Ryan ended February 8. Defendant found guilty. Prosecutor K. Rapp.

Paul Lerner: Client charged with aggravated assault. Investigator G. Beatty. Trial before Judge Jarrett ended February 9. Defendant found guilty. Prosecutor M. Vincent.

February 13

Dave Anderson: Client charged with indecent exposure. Trial before Judge Portley ended February 15. Defendant found guilty. Prosecutor C. Leisch.

Ron Corbitt: Client charged with possession of drug paraphernalia and possession of methamphetamine. Trial before Judge Skelly ended February 15. Defendant found guilty. Prosecutor K. Mills.

Paul Klapper: Client charged with aggravated assault (dangerous and with priors). Trial before Judge Ryan ended February 15 with a hung jury. Prosecutor K. Rapp.

Joe Stazzone: Client charged with possession of dangerous drugs. Trial before Judge Bolton ended February 15. Defendant found **not guilty**. Prosecutor D. Schumacher.

(cont. on pg. 13)☞

February 14

Brad Bransky: Client charged with aggravated assault (dangerous). Trial before Judge Wilkinson ended February 16. Defendant found **not guilty**. Prosecutor A. Keever.

February 16

Donna Elm: Client charged with aggravated driving (with two priors). Trial before Judge Topf ended February 27. Defendant found guilty. Prosecutor T. Doran.

Marie Farney: Client charged with possession of dangerous drugs and possession of marijuana (with two priors). Investigator W. Woodriffe. Trial before Judge Dougherty ended February 16. Defendant found guilty with only one prior. Prosecutor Davidon.

February 21

George Gaziano: Client charged with aggravated assault (dangerous). Trial before Judge Jarrett ended February 23. Defendant found guilty. Prosecutor J. Hicks.

Doug Gerlach: Client charged with aggravated assault (dangerous and with two priors). Investigator H. Jarrett. Trial before Judge Kaufman ended February 22. Defendant found guilty. Prosecutor G. McKay.

Tom Kibler: Client charged with aggravated assault. Trial before Judge Ryan ended February 22. Defendant found guilty. Prosecutor J. Collins.

February 23

Cathy Hughes: Client charged with two counts of aggravated assault (dangerous) and four counts of criminal damage. Investigator M. Fusselman. Trial before Judge Bolton ended March 8 with a hung jury on all counts. Prosecutor D. Patton.

February 27

Katie Carty: Client charged with resisting arrest. Trial before Judge Kaufman ended February 28. Defendant found guilty. Prosecutor J. Rizer.

Dennis Farrell: Client charged with aggravated assault. Investigator R. Gissel. Trial before Judge Chornenky ended March 1. Defendant found **not guilty**. Prosecutor Clark.

Randall Reece: Client charged with possession of dangerous drugs and misconduct with weapons. Trial before Judge DeLeon ended March 1. Defendant found **not guilty**. Prosecutor Wolfson. Ω

IT IS THE SPIRIT AND NOT THE FORM OF LAW THAT KEEPS JUSTICE ALIVE.
--Earl Warren

Bulletin Board

Speakers Bureau

Cecil Ash spoke to Deer Valley Middle School students about the Public Defender's Office and defense work at Career Day on January 27.

Personnel

Rick Barwick, an Investigator in Trial Group D, left our office on March 13 to join an investigation unit in state government.

Barbara Brown, a legal secretary in Trial Group C, will leave at the end of March to transfer to the Public Fiduciary's Office.

Nancy Johnson, an attorney in Trial Group D, left our office on March 03 to go into private practice in Casa Grande. Ω

Maricopa County Public Defender
Training Schedule

Date	Time	Title	Location
03/24/95	9:00 a.m. - 4:30 p.m.	Attorney Training: "*Issues for Representing the 1995 DUI Client*" with Dan Lowrance, MCPD, Gary Kula, Esq., and many more. (CLE hours)	Supervisors Auditorium
05/12/95	all day (details to be announced)	Attorney/Investigator Training: *Forensics* (CLE hours)	Crowne Plaza Central & Adams

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

--Justice White, concurring in *United States v. Wade*,
388 U.S. 218, 256-258 (1966).